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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 352

JULIA THOMPSON, *Petitioner*

v.

RICHARD P. LAWSON, AS DEPUTY COMMISSIONER OF
THE UNITED STATES BUREAU OF EMPLOYEES'
COMPENSATION, SIXTH COMPENSATION DIS-
TRICT, ET AL.

On Writ of Certiorari to the United States Court of
Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT DEPUTY COMMISSIONER

OPINIONS BELOW

No opinion was written by the United States District Court for the Southern District of Florida. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 23-26) is reported at 205 F. 2d 527.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1953 (R. 27). The petition for a writ of certiorari was filed on September 16, 1953 and was granted on November 16, 1953 (R. 28). By order of December 14, 1953, the order granting the petition was vacated. On January 4, 1954, certiorari was again granted. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the legal wife of a longshoreman killed in the course of his employment is his "widow" within the meaning of Section 2(16) of the Longshoremen's and Harbor Workers' Compensation Act in a case where (a) she was deserted by the longshoreman 25 years prior to his death and (b) subsequent to the desertion she entered into a bigamous marital relationship.

STATUTE INVOLVED

Section 2 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. 902, provides in relevant part as follows:

When used in this Act —

* * * * *

(16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or

living apart for justifiable cause or by reason of his desertion at such time. ,

STATEMENT

By this action for a mandatory injunction, petitioner Julia Thompson seeks to set aside and annul the order rejecting her compensation claim, entered by respondent Richard P. Lawson, Deputy Commissioner, Bureau of Employees' Compensation, for the Sixth Compensation District, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. 901 *et seq.*¹ The pertinent facts may be summarized as follows:

On June 7, 1951, Otis Thompson was employed by respondent Gulf Florida Terminal Company, Inc. as a gang-header in connection with the loading of the *SS Mobilian* in Tampa, Florida (R. 7). While aboard that vessel in the performance of his duties, Thompson sustained personal injuries which resulted in his death on June 15, 1951 (R. 7).

Both petitioner and Sallie Thompson filed claims with the Deputy Commissioner for the death bene-

¹ Section 21(b) of the Act (33 U.S.C. 921 (b)) provides that an injunction proceeding in a district court shall be the manner of obtaining judicial review of compensation orders, and that an order may be set aside "if not in accordance with law." The scope of review is that of the Administrative Procedure Act. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504.

fits accorded a "surviving wife" by Section 9(b) of the Longshoremens' Act (R. 6). The Deputy Commissioner conducted a hearing in order to determine which, if either, of the two women was the deceased longshoremen's "widow" within the meaning of Section 2(16) of the Act.² The evidence adduced at this hearing showed the following: On January 15, 1921, petitioner and Thompson were lawfully married (R. 7-8). They lived together in Randolph County, Georgia, from that date until November 1925, when Thompson deserted petitioner and moved to Tampa, Florida, where he lived until his death (R. 8). While the marriage was never terminated by divorce, Thompson contributed nothing to the support of petitioner or their two children at any time subsequent to the desertion; nor did petitioner seek to compel such support (R. 8). In 1926, however, Thompson commenced an extra-marital relationship with Sallie Williams (R. 9). In 1929, the couple went through a marriage ceremony and remained together until 1949, when Sallie Williams left Thompson and moved to New Jersey (R. 9). Thereafter, she saw Thompson only on occasional

² It is settled that a woman must be a "widow" as defined in Section 2(16) in order to qualify for the death benefits accorded a "surviving wife" by Section 9 (b) of the Act. *Weeks v. Behrend*, 135 F. 2d 258 (C.A.D.C.); *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988 (C.A. 9); *Williams v. Lawson*, 35 F. 2d 346 (C.A. 5).

return visits to Florida which were of short duration (R. 10).

Petitioner, on the other hand, continued to live in Georgia until 1936 when she moved to Florida (R. 8). In June 1940, she bigamously married Jimmie Fuller at Miami, Florida, and ever since then she has been known as Julia Fuller (R. 8). The bigamous relationship continued until 1949 when Fuller obtained a divorce from petitioner in Ohio on the ground of desertion (R. 8-9). In May, 1951, petitioner was approached by Thompson who inquired whether she would "take him back" (R. 10). Having no intention of ever living with Thompson again, petitioner refused to return to him (R. 10).

On these facts, the Deputy Commissioner found that Sallie Williams Thompson was not the lawful wife of the deceased longshoreman³ and that petitioner was not living apart from him "for justifiable cause or by reason of his desertion" at the time of his death, within the meaning of Section 2(16) of the Longshoremen's Act, *supra*, pp. 2-3

³ While the Social Security Act expressly provides that an applicant's status as the wife of the deceased employee is to be determined by reference to state law (Act of August 28, 1950, c. 809, Title I, § 104(a), 64 Stat. 511, 42 U.S.C., Supp. V. 416(h) (1)), the Longshoremen's Act is silent in this respect. It has been judicially interpreted, however, as if it contained such a provision. *Bolin v. Marshall*, 76 F. 2d 668 (C.A. 9); *Green v. Crowell*, 69 F. 2d 762 (C.A. 5); *Keyway Stevedoring Co. v. Clark*, 43 F. 2d 983 (D. Md.).

(R. 10). Accordingly on May 23, 1952, the Deputy Commissioner entered an order rejecting both claims to compensation (R. 11).⁴

On June 11, 1952, petitioner filed her complaint for injunction in the District Court, seeking to set aside and annul the Deputy Commissioner's order on the ground that the "wrong-doing of [petitioner] after she commenced to live apart from the deceased for justifiable cause did not deprive her of the right to the death benefit as his surviving wife and widow * * *" (R. 1-5). Both the employer and the Deputy Commissioner moved to dismiss the complaint (R. 13-15). On December 31, 1952, the District Court granted these motions on the ground that it affirmatively appeared from the findings of fact contained in the compensation order, which had been attached to the complaint, that the rejection of petitioner's claim was correct as a matter of law (R. 15-16). The court cited *Ryan Stevedoring Co. Inc. v. Henderson*, 138 F.

⁴ The Deputy Commissioner's order allowed attorneys fees to counsel for petitioner and Sallie Thompson in the amounts of \$400 and \$300 respectively (R. 10, 11). In addition, the insurance carrier paid \$400 to petitioner's daughter by way of partial reimbursement for the funeral expenses which the daughter had assumed (R. 7).

As far as the record shows, neither of the children born of petitioner's marriage to the longshoreman filed claims for compensation. Their right to death benefits, however, is not conditioned upon petitioner's qualifying as the longshoreman's "widow" for the purposes of Section 2(16). See Sections 2(14), 9(b) (33 U.S.C. 902(14), 909 (b)).

2d 348, and *American Mutual Liability Ins. Co. v. Henderson*, 141 F. 2d 813, in which the Court of Appeals for the Fifth Circuit had held that where the deserted wife undertakes a bigamous or common law relationship with another man she no longer is living apart from her husband for justifiable cause or by reason of his desertion (R. 16).⁵ On appeal, the Court of Appeals affirmed on the authority of its earlier decisions (R. 23-26). In addition the court held that, even if its view as to the effect of the bigamous relationship was in error, the refusal of petitioner to return to the longshoreman upon his request, made three weeks prior to his injury (*supra*, p. 5), formed sufficient basis for the Deputy Commissioner's rejection of her claim for death benefits (R. 26).

SUMMARY OF ARGUMENT

By the terms of Section 2(16) of the Longshoremen's Act, petitioner's eligibility for the death benefits accorded a "surviving wife", under Section 9 of the Act, is wholly dependent upon a determination that *at the time of the longshoreman's death* she was living apart from him "for justifiable cause or by reason of his desertion". The holding below that petitioner, who after being deserted by the longshoreman entered into a bigamous marriage with another man, does not meet

⁵ Accord: *Henderson v. Avondale Marine Ways, Inc.*, 204 F. 2d 178 (C.A. 5).

this test is grounded upon the view, also expressed in earlier decisions of the Fifth Circuit, that the creation by the wife of a new marital relationship destroys the causal connection between the separation and the desertion (or other justifiable cause for the separation). This position conflicts with that of the Second and Ninth Circuits, which is that, insofar as Section 2(16) is concerned, no attention should be paid to the conduct of the wife after she commences living apart for justifiable cause or by reason of her husband's desertion.

Two basic questions arise from this conflict; *first*, may the Deputy Commissioner inquire into petitioner's post-separation conduct, and *second*, if inquiry is permitted, what standards shall he apply in determining the conduct which results in termination of the causal connection between (a) the husband's desertion and (b) the wife's living apart at the time of death? As to the second question, there are two general alternatives:—reference to local domestic relations law or the approach of the court below.

A. The position of the Second and Ninth Circuits rests largely on the absence of express language in Section 2(16) authorizing inquiry into the wife's post-separation conduct or detailing circumstances in which a separated wife may cease to live apart from her husband for "justifiable cause or by reason of his desertion". But that

it was not the legislative purpose to exclude from consideration all post-separation events is demonstrated by the fact that the Section adopts the time of the longshoreman's death as the point of reference for determining the wife's eligibility for death benefits. Furthermore, the total disregard of such events will, on occasion, produce a result plainly inconsistent with the compensatory objective of the Longshoreman's Act, *e.g.*, the granting of benefits to a wife who has unjustifiably refused to return to her husband.

B. Both "desertion" and "justifiable cause" are familiar concepts in domestic relations law. Several state courts, in construing provisions in state workmen's compensation acts similar to Section 2(16), have attached to those terms the meaning that would be given them in a divorce or separate maintenance proceeding. While, in terms of the compensatory purpose of the Longshoremen's Act, there is some reason to equate the right to death benefits with the right to support, this standard has substantial weaknesses. In almost all jurisdictions, the wife seeking separate maintenance must show, as justifiable cause for the separation, some misconduct on the part of the husband. But there is no uniformity among the jurisdictions as to how serious the misconduct must be. Consequently, the Deputy Commissioner, who is sufficiently burdened with his present duties, will be required to develop expertise as to the

separate maintenance law of every state within his compensation district, and will be faced as well with varying choice of law problems.

Moreover, since separate maintenance proceedings are generally deemed equitable in nature, the spouse seeking to enforce rights incident to the marital status may be confronted with the "clean hands" doctrine. A single act of adultery will generally destroy the wife's right to support, whether it occurred while the parties lived together or after there was a separation due to the husband's misconduct. A test which would condition benefits on the showing that claimant's conduct was beyond reproach has no place, however, in the administration of the Longshoremen's Act. This is especially true where the alleged misconduct took place after the separation. And, since the wife's misconduct is simply a defense available to the husband in a separate maintenance action, to invoke a right-to-support test for the purposes of Section 2(16) is unjustifiably to indulge the employer with the presumption that the longshoreman knew of the misconduct and would have raised it as a defense.

C. The court below expressly rejected the theory that it was passing judgment on the morality of petitioner's actions. In its view, the later bigamous marriage destroyed the causal connection between the wife's living apart and the husband's desertion because it amounted to a renunciation

by petitioner of her status as the wife of the longshoreman. It is clear that this interpretation of the bigamous marriage is correct, and, from the standpoint of the Act's purpose to compensate for loss, there is no basis for awarding benefits to a wife who has freely exercised a choice to disavow the marital relationship. A person in petitioner's circumstances can point to no economic or even emotional loss from the death of the longshoreman, and none should be presumed.

The language of Section 2(16) is entirely consistent with the rejection of petitioner's claim on this basis. In realistic terms, after petitioner bigamously remarried she lived apart because she had affirmatively disavowed her marriage to the longshoreman and had become the "wife" of another; she no longer was the longshoreman's wife living apart for justifiable cause. In general application, the criterion adopted by the Fifth Circuit will not impose an untoward or novel burden upon the Deputy Commissioner. The result which should be reached is plain in a case like this. In instances where the post-separation conduct is less decisive in character, it is possible that the record taken as a whole may justify more than one inference as to the wife's purpose. But the Deputy Commissioner often must select between conflicting inferences in the resolution of other questions upon which an award of compensation may hinge and as to which his finding, having a

reasonable foundation in fact and in law, is conclusive.

ARGUMENT

PETITIONER'S UNDERTAKING OF A BIGAMOUS MARRIAGE TERMINATED HER STATUS AS THE WIFE OF THE DECEASED LONGSHOREMAN "LIVING APART FOR JUSTIFIABLE CAUSE OR BY REASON OF HIS DESERTION" WITHIN THE MEANING OF SECTION 2(16) OF THE LONGSHOREMEN'S ACT.

Introduction

Section 2(16) of the Longshoremen's and Harbor Workers' Compensation Act stipulates that the term "widow", for the purpose of determining eligibility for the death benefits accorded a "surviving wife" by Section 9(b) of the Act, encompasses "only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."⁶ Peti-

⁶ The Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. 751 *et seq.* has an almost identical provision (5 U.S.C. 760(H)). So do the workmen's compensation statutes of Maine, Massachusetts, Michigan, North Carolina, Rhode Island and Vermont. See Me. Rev. Stat. c. 26 § 2 (1944); Mass. Ann. Laws c. 152, § 32 (1950); Mich. Stat. Ann. § 17.156 (1950); N.C. Gen. Stat. § 97.2 (1950); R.I. Gen. Laws c. 300, Art. II, § 7(a) (1938); Vt. Stats. § 8088 (1947). The New York statute, upon which the Longshoremen's Act was patterned [See H. Rept. 1190, 69th Cong., 1st Sess. p. 2; *Lawson v. Suwanee S. S. Co.*, 336 U.S. 198, 205], requires merely that the claimant be the employee's "surviving wife." New York Workmen's Compensation Law, §16 (McKinney 1946). While the relevant portions of the other state acts vary considerably, most of them require that the wife, if not a part of the decedent's household at the time of

tioner concededly does not come within the first or second test—*i.e.*, although she was the legal wife of the deceased longshoreman, she was neither living with him nor dependent for support upon him at the date of his death. Thus, her right to compensation wholly depends upon a determination that, at the time of the longshoreman's death, she was living apart from him "for justifiable cause or by reason of his desertion".

The evidence adduced at the compensation hearing showed that petitioner commenced living apart from the deceased longshoreman as the consequence of being deserted by him. It further showed,

his death, be actually dependent upon him, See 9 Schneider's *Workmen's Compensation* (3rd Ed. 1950) §§ 1945-1997, for a compilation of the death benefit provisions of all of the American workmen's compensation statutes.

With the exception of the Act relating to widows of World War I veterans, which is discussed below (see fn. 20, *infra*, pp. 27, 28), none of the other federal statutes conferring death benefits uses language similar to that of the Longshoremen's Act. For example, under the Social Security Act, 49 Stat. 620, as amended, 42 U.S.C. 301 *et seq.*, the wife must either be a member of the husband's household, receiving contributions from him towards her support, or the beneficiary of a court order directing him to contribute to her support. See 42 U.S.C. 402(e), 42 U.S.C. Supp. V, 416(c), 416(h) (2). The Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U.S.C. 228a *et seq.*, adopts the same test. See 45 U.S.C., Supp. V, 228e (1). And the Civil Service Retirement Act, 41 Stat. 614, as amended, 5 U.S.C., 691 *et seq.*, defines "widow" as a surviving wife who either was married to the Government employee for at least two years immediately preceding his death or is the mother of issue by such marriage (5 U.S.C., Supp. V, 724(d) (1)).

however, and the Deputy Commissioner found, that after being deserted petitioner (a) contracted a bigamous marriage and held herself out for over nine years as the wife of the other man, and (b) responded in the negative to the longshoreman's inquiry, made a few weeks before his death (some 25 years after the separation was effected), as to whether she would "take him back." On these facts, the Deputy Commissioner determined that petitioner "was not living apart from Otis Thompson at the time of his death for justifiable cause or by reason of his desertion." While denominated a finding of fact, this determination undoubtedly amounted to a conclusion of law, in light of the earlier holdings of the Court of Appeals for the Fifth Circuit that, as a matter of law, a wife does not fulfill the statutory requirement in such circumstances. *Ryan Stevedoring Co. v. Henderson*, 138 F. 2d 348; *American Mut. Liability Ins. Co. v. Henderson*, 141 F. 2d 813; see also, *Henderson v. Avondale Marine Ways, Inc.*, 204 F. 2d 178⁷.

The court below, in upholding the rejection of the compensation claim, has reaffirmed its prior decisions. Its rationale is that the creation by the wife of a new marital relationship destroys the causal connection between the separation and the desertion (or other justifiable cause for the separation). This position is in direct conflict with that

⁷ In these cases, the Fifth Circuit *reversed* awards of compensation entered by the Deputy Commissioner.

of the Second and Ninth Circuits, these courts being of the view that, insofar as Section 2(16) is concerned, no attention should be paid to the conduct of the wife after she commences living apart for justifiable cause or by reason of her husband's desertion. *Associated Operating Co. v. Lowe*, 52 F. Supp. 550 (E.D.N.Y.), affirmed on opinion below, 138 F. 2d 916 (C.A. 2); *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988 (C.A. 9); see also to the same effect, *Travelers Ins. Co. v. Norton*, 34 F. Supp. 740 (E.D. Pa.).⁸

The Second and Ninth Circuits would require Deputy Commissioners within the bounds of their jurisdiction to act favorably on the claim of a wife, like petitioner, who began living apart from her husband by reason of his desertion—regardless

⁸ Petitioner asserts (Pet. Br. p. 4) that the interpretation given to Section 2(16) by the Bureau of Employees' Compensation in the Department of Labor accords with this view. In support of this assertion she refers to rulings which have been judicially reviewed and reported, claiming that, except in the instant case, deputy commissioners have always awarded compensation to persons in petitioner's situation. We have been unable to determine what conclusions were reached on this question by the various deputy commissioners in circumstances where there has been no judicial review of their orders. In any event, the Bureau of Employees' Compensation itself has never issued any ruling in regard to the proper construction of the Section. As a matter of practice, the deputy commissioners rely principally, in construing the Longshoremen's Act, upon judicial decisions applicable to their territory.

For the views of the Employees' Compensation Appeals Board in construing the comparable provision of the Federal Employees' Compensation Act, see *infra*, pp. 29-30, fn. 21.

of her later conduct, life, or actions. On the other hand, if the wife's post-separation actions are not wholly irrelevant, the additional question remains as to the proper standard to be applied by the Deputy Commissioner in deciding whether the widow is still living separately for justifiable cause or because of desertion. In particular, the issue here is whether, by holding herself out to be the wife of another individual, the wife relinquished her status as the widow of the deceased longshoreman living apart from him by reason of his desertion.⁹

Neither the statutory language nor the legislative history of the Act¹⁰ provides much illumina-

⁹ While the court below advanced, as an independent ground for affirming the Deputy Commissioner's denial of benefits, petitioner's rejection of the belated offer to return to her husband (*supra*, p. 7), we believe, for reasons stated hereafter, that it is doubtful whether much weight may attach to these circumstances in this particular case. See *infra*, pp. 33, fn. 22. There is nothing in the opinions of the other circuits expressly suggesting that the Deputy Commissioner may not take such a rejection into consideration. This is the first case requiring a construction of Section 2(16) in which the rejection of an offer to resume matrimonial living is involved. In *Associated Operating Co., Moore Dry Dock Co. and Travelers Ins. Co.*, *supra*, the courts took the question to be the effect of post-separation immoral or unlawful conduct upon the right to compensation benefits. See *supra*, pp. 14-15.

¹⁰ See 67 Cong. Rec. 4119, 10608, 10614; 68 Cong. Rec. 5402, 5414. 5900-5909; S. Rept. 973, 69th Cong., 1st Sess.; H. Rept. No. 1767, 69th Cong., 2nd Sess.; H. Rept. No. 1190, 69th Cong., 1st Sess.; Hearings, Senate Subcommittee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., March 16 and April 2,

tion, and the discussion of these questions must be largely in terms of the over-all statutory purposes: —to require employers to compensate “employees and their dependents *who sustain loss* as a result of personal injuries and deaths occurring in the course of their work, whether with or without fault attributable to employers.” *Balt. and Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414 (emphasis added). That Section 2(16) is directed to this end of compensating for loss is shown by the circumstance that, although it does not make actual dependency an absolute condition of recovery by

1926; Hearings, House Committee on the Judiciary, on S. 3170, 69th Cong., 1st Sess., June 26, 1926.

Nor is the legislative history of the Federal Employees' Compensation Act, which as already noted (fn. 6, *supra*, p. 12) defines “widow” in almost identical terms, of much assistance. The statute as first enacted provided that the term “widow” included only the decedent's wife “living with or dependent for support upon him at the time of his death.” Act of September 7, 1916, c. 458, § 10(H), 39 Stat. 744-745. In 1927, the year the Longshoremen's Act was passed, the 1916 Act was amended by enlarging the definition of “widow” to include the wife “living apart for reasonable cause or by reason of [the husband's] desertion.” Act of February 12, 1927, 44 Stat. 1086, 1087. The committee reports indicate that the amendment was made pursuant to the recommendation of the United States Employees' Compensation Commission. While the supporting memorandum from the Commission was incorporated in both the House and Senate reports, it simply states that the cases that will come under the added proviso “are not numerous and probably can only be determined by personal investigation on the part of the commission, but * * * such cases are quite as meritorious as those described under the terms of the act as it now reads * * *.” See S. Rept. 1324, 69th Cong., 2nd Sess., p. 2; H. Rept. 936, 69th Cong., 1st Sess., p. 2.

the separated wife (as do the comparable provisions of most state workmen's compensation statutes), it is obviously not modeled after the New York proviso (N.Y. Workmen's Compensation Law, Section 16) which automatically equates status as the employee's lawful wife with the right to death benefits (see fn. 6, *supra*, p. 12).

A. The Act Does Not Entitle the Widow to Benefits Merely Because She Was Initially Separated From the Longshoreman for Justifiable Cause.

The Courts of Appeals subscribing to petitioner's view that the Deputy Commissioner may not look into the post-separation conduct of the wife have advanced as the governing consideration the absence of express language in Section 2(16) authorizing such inquiry (*Associated Operating Co. v. Lowe*, 52 F. 2d Supp. 550 (E.D. N.Y.), affirmed, 138 F. 2d 916 (C.A. 2)), as well as the failure expressly to provide that an "employee's widow who, while married to such employee, went through a marriage ceremony with another man and thereafter lived with and was supported by him shall not be entitled to a death benefit." *Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988, 990 (C.A. 9). This view seems to be that the failure of the Act to detail the circumstances in which a separated wife may cease to live apart from her husband for justifiable cause (or by reason of his desertion) evidences a Congressional purpose that the burden of a wife in petitioner's situation is

limited to showing that she was originally deserted or that the longshoreman's conduct justified her departure from the matrimonial domicile.

But that it was not the legislative purpose to exclude from consideration all post-separation events is demonstrated by the terms of Section 2(16) itself. It simply cannot be ignored that the Section stipulates that the claimant's status as the surviving wife entitled to the benefits conferred by Section 9(b) of the Act is to be determined *as of the time of the longshoreman's death*. The Section provides (see *supra*, pp. 2-3) that "widow" includes "*only*" the longshoreman's wife "living with or dependent for support upon him *at the time of his death*," or a wife "living apart for justifiable cause or by reason of his desertion *at such time*" (emphasis added). Clearly, if Congress had desired to adopt as a point of reference the time that the parties separated it would have employed language more fitting to that end.

Furthermore, the total disregard of post-separation events will occasion in some instances a result wholly inconsistent with the overall objectives of workmen's compensation. A striking example, not unknown to common experience, is the situation where a deserted wife, in addition to rejecting a genuine offer of her husband to return (made within a reasonable time and accompanied by a suitable promise and expectancy of

reformation), advises him that so far as she is concerned her marital life with him is a closed chapter. In these circumstances, the subsequent death of the husband does not compel or warrant the inference that she has suffered an economic or even an emotional loss. Quite to the contrary, the award of death benefits under those conditions has all the earmarks of a windfall (see p. 31, *infra*).

We think it clear, therefore, that Section 2(16) allows, indeed demands, at least a limited inquiry into the events transpiring after the wife has been deserted by the longshoreman. The pivotal question becomes the permissible extent of this inquiry. In answering the question, there are two approaches which have received judicial support. Apart from the position of the court below—that the wife's living apart for justifiable cause or by reason of the employee's desertion is terminated by conduct on her part which, viewed objectively, constitutes a conscious election by her to renounce her status as wife—there are the holdings of several state courts, in construing similar provisions in state workmen's compensation acts, that local domestic relations law is the applicable criterion. We shall discuss both of these standards.

B. The Act Does Not Hinge the Widow's Entitlement to Benefits on the Local Law of Divorce or Separation.

1. Although neither "desertion" nor "justifiable cause" have been the subject of precise judicial

definition for the purposes of Section 2(16), both terms are familiar in domestic relations law. In most jurisdictions, desertion is one of the statutory grounds for divorce or separate maintenance. Nelson, *Divorce and Annulment* (2nd Ed. 1945), §§ 4.01, 32.13.¹¹ And the concept of "living apart for justifiable cause" has long been employed in determining the rights of the respective spouses in a separate maintenance proceeding (*infra*, pp. 23-26).

It has been suggested by the District of Columbia Circuit that Congress used these terms in the Longshoremen's Act in their "legal sense." *Weeks v. Behrend*, 135 F. 2d 258, 259.¹² And several state courts, in construing comparable provisions in state workmen's compensation acts, have arrived at the same conclusion. *In re Newman's case*, 222 Mass. 563, 111 N.E. 359; *Martilla v. Quincy Mining Co.*, 221 Mich. 525, 191 N.W.

¹¹ As of 1945, desertion was a ground for an absolute divorce in 32 states, the District of Columbia, and several territories and possessions. And all the remaining states except New Hampshire, New York, North Carolina, and South Carolina had adopted abandonment and neglect as a basis for divorce. See table in 3 Nelson, *Divorce and Annulment* (2nd Ed. 1945), preceding p. 615.

¹² The Longshoremen's Act was adopted by Congress as the workmen's compensation statute of the District of Columbia. Act of May 17, 1928, c. 612, § 1, 45 Stat. 600; D.C. Code (1951), § 36-501. In addition, it is applicable at present to civilian employment at military, air, and naval bases outside the United States. Act of August 16, 1941, c. 357, § 1, 55 Stat. 622, as amended, 42 U.S.C. 1651.

1943; *Scott's Case*, 117 Me. 436, 104 A. 749; but cf. *Broughey v. Mowry Grain Co.*, 61 R.I. 221, 200 A. 768. Thus, in *Scott's Case*, *supra*, the Supreme Court of Maine held that the claimant's adultery, after being deserted by her husband, deprived her of her status, under the state compensation act, as a wife living apart from her husband by reason of his desertion. The court's rationale was that the term "desertion" is used in its normal matrimonial sense and that, if the deserted party furnishes ground for the deserter's remaining apart, desertion ceases to be a wilful and unjustifiable abandonment of one party by the other, and therefore a ground for divorce. The principle that an act of adultery committed by the deserted spouse precludes desertion as a basis for a divorce (or separate maintenance) is, of course, not peculiar to Maine. In numerous, if not in all, jurisdictions, the desertion is terminated when the abandoned spouse engages in adulterous conduct and the deserter becomes justified in continuing to live apart. Nelson, *supra*, § 4.26.

Though the relationship between the right to a divorce and entitlement to workmen's compensation benefits may be obscure, there is some basis for giving "desertion" and "justifiable cause" the same meaning in Section 2(16) as these terms would be given in a separate maintenance proceeding. The mere fact that at the time of the long-

shoreman's death his wife was neither living with him nor being supported by him does not necessarily mean that she has failed to suffer an economic loss. On the contrary, if there was an obligation upon the part of the employee-husband to support her, she has lost the right, exercisable at any time, of seeking a court order compelling him to do so. But where the right to support has been forfeited, it is difficult to see how the wife has been adversely affected economically by the longshoreman's death. Not being able to look to him for support while he lived, she is hardly in the position to contend that she is entitled to compensation by virtue of his death.

2. In spite of the surface plausibility of looking to local separate maintenance law in determining whether the wife's post-separation conduct has affected her entitlement to death benefits, such a test has substantial weaknesses. In the first place, if local law is the decisive factor where post-separation conduct is concerned, consistency dictates that it also be applied where the Deputy Commissioner is called upon to evaluate the cause or justifiability of the initial separation. In almost all jurisdictions, there can be no "justifiable cause" for separation unless there has been some misconduct by the other party. See, e.g., *Weeks v. Behrend*, 135 F. 2d 258 (C.A.D.C.); *Luckenbach Gulf S.S. Co. v.*

Henderson, 133 F. 2d 305 (C.A. 5).¹³ But what may be misconduct sufficient to warrant separation in one jurisdiction may not suffice in another.¹⁴ Consequently, the Deputy Commissioner will be required to develop some degree of

¹³ In the *Weeks* case, the question was whether a wife who lived apart from her husband by mutual consent came within the statutory definition in the Longshoremen's Act. The District of Columbia Circuit held that she did not, based on its view that a wife "who lives apart does so for what is called 'justifiable cause' only when she does so because of her husband's matrimonial misconduct". 135 F. 2d at 259. There was no occasion for the court to pass upon either the question presented here or the issue as to how serious the misconduct must be. In *Luckenbach*, the Fifth Circuit held that, on conflicting evidence regarding the circumstances of the separation, the Deputy Commissioner was entitled to find that the claimant came within Section 2(16). No attempt was made by the court to lay down an applicable standard; the evidence on behalf of the claimant, which the Deputy Commissioner accepted, showed, however, that the longshoreman left the marital domicile after an argument about financial matters and repeatedly refused requests by the wife to return to her.

¹⁴ In some states, the misconduct of the husband must be sufficient to entitle the wife to a divorce. See *e.g.* *Preston v. Preston*, 116 Fla. 246, 157 So. 197; *Sweat v. Sweat*, 238 Iowa 999, 29 N.W. 2d 180; *Perkins v. Perkins*, 154 Kan. 73, 114 P. 2d 804; *Heinmuller v. Heinmuller*, 133 Md. 491, 105 A. 745; *Potts v. Potts*, 237 Mich. 112, 211 N.W. 74; *Phillips v. Phillips*, 223 N.C. 276, 25 S.E. 2d 848. In others, misconduct of a less serious nature will warrant an award of separate maintenance. See *e.g.* *Love v. Love*, 239 Ala. 166, 194 So. 555; *Winterberg v. Winterberg*, 177 Ill. App. 493; *Huffman v. Huffman*, 310 Ky. 688, 221 S.W. 2d 649; *Bradford v. Bradford*, 296 Mass. 187, 4 N.E. 2d 1005; *Richman v. Richman*, 129 N.J. Eq. 114, 18 A. 2d 403; *Commonwealth ex. rel. Pinkenson v. Pinkenson*, 162 Pa. Super. 227, 57 A. 2d 720.

expertise in the separate maintenance law of all the states within the bounds of his compensation district, besides being possibly faced with varying choice-of-law problems. It is doubtful whether these functions should be assumed by these busy officials who are sufficiently burdened with the performance of many other duties.¹⁵

There are still more fundamental problems involved in the automatic acceptance of the meaning accorded the statutory terms in a state separate-maintenance action. Since such proceedings are generally taken to be equitable in nature, the spouse seeking to enforce rights incident to the marital status may be confronted with the "clean hands" doctrine.¹⁶ For instance, a single act of adultery generally destroys the wife's right to support whether it took place while

¹⁵ It is true, of course, that the Deputy Commissioner must look to state law in deciding whether the claimant was the "wife" of the longshoreman at the time of his death (see fn. 3, *supra*, p. 5). In the absence of Congressional definition of the term for the purposes of the Act, it is difficult to see any other available point of reference. Cf. *Scaboard Air Line Ry. v. Kenney*, 240 U.S. 489, 493-497; *Weyerhaeuser Timebr Co. v. Marshall*, 102 F. 2d 78 (C.A. 9). And it is a relatively easy matter to determine whether under the law of the matrimonial domicile the claimant and the longshoreman occupied the relationship of husband and wife.

¹⁶ Nelson, *Divorce and Annulment* (2nd Ed. 1945), § 32.03. According to the majority view, the proceeding remains equitable even though sanctioned by statute. *Ibid.* See also Schouler, *Marriage, Divorce, Separation, and Domestic Relations* (6th Ed. 1921), §§ 1319, 1320.

she was still living with her husband (see 10 A.L.R. 2nd 498),¹⁷ or after the parties had separated because of the husband's desertion or other misconduct. See, e.g., *M. Martin Polokow Corp. v. Industrial Commission*, 336 Ill. 395, 168 N.E. 271; *Ellett v. Ellett*, 157 N.C. 161, 72 S.E. 861; cf. pp. 21, 22, *supra*.¹⁸

One may well doubt the wisdom of taking a single post-separation wrongdoing on the part of the wife as sufficient basis for depriving her of any economic assistance from the husband, with all of its consequences not only for the individual but also, where the wife has no independent means of support, for the community at large. In any event, as has been uniformly recognized by the courts of appeals considering this question, a test which would condition benefits upon the showing that the claimant's conduct was beyond reproach has no proper place in the administration of the Longshoremen's Act.¹⁹ This is

¹⁷ See also Nelson, *Divorce and Annulment* (2nd Ed. 1945), § 32.21; Brown, *The Duty of the Husband to Support the Wife*, 18 Va. L.R. 823, 837 (1932).

¹⁸ In the *Polokow* case a woman who had engaged in illicit relations after having been deserted by her husband was held not entitled to death benefits under the Illinois workmen's compensation statute because the statute conditioned the award of such benefits to the wife upon the deceased employee's having a legal obligation to support her.

¹⁹ The opinion of the court below expressly states that the basis for rejection of petitioner's claim was not that "at the time of the death of the husband, [she] was living an immoral life and must be punished therefor." (R. 25).

especially true where, as here, the alleged misconduct occurred *after* the wife had left the husband for admittedly good cause or had been deserted by him. Quite apart from the impropriety of allowing the employer to place the wife on trial at the compensation hearing, thereby subjecting the proceeding to the grossly exaggerated charges and counter-charges which are an integral part of many matrimonial controversies, the fact is that the post-separation misconduct may be causally related to the husband's actions which forced the wife to establish a separate domicile at the outset. While this may not be a relevant consideration in a separate maintenance action, it certainly assumes importance in the area of workmen's compensation. Moreover, the holding that a woman deserted by her husband ceases to live apart by reason of his desertion solely because she has failed to conform to the prevailing moral code would not seem to accord with the mandate that the Longshoremen's Act is to be liberally construed to give economic benefits to the workmen and their families. *Balt. & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414; *Harbor Marine Contracting Co. v. Lowe*, 152 F. 2d 845, 847 (C.A. 2), certiorari denied, 328 U.S. 837; *Travelers Insurance Co. v. Branham*, 136 F. 2d 873, 875 (C.A. 4).²⁰

²⁰ Because of this requirement of a liberal construction, the rather narrow administrative interpretation of a similar provision in a veterans benefit statute is not particularly signifi-

Finally, it is significant that the wife's misconduct does not bar her from receiving support payments unless the husband raises the defense. There is no general public policy, to be vindicated by the state or the community, requiring a faulty wife to be cut off from all support. Instead, misconduct is merely a defense available to the husband in a suit brought by the wife to recover separate maintenance. Nelson, *supra*, § 32.21. In compensation proceedings, to invoke a right-to-support test for the purposes of Section 2(16) is to indulge the employer with the presumption that the husband knew of the misconduct and would have raised it as a defense. It is highly questionable whether the employer is or should be entitled to the benefit of that presumption.²¹

cant. Section 3 of the Act of May 13, 1938, c. 214, 52 Stat. 353, as amended, 38 U.S.C. 505a, provides in relevant part that "[n]o compensation or pension shall be paid to a widow [of a World War I veteran] unless there was continuous cohabitation with the [veteran] from the date of marriage to date of death, except where there was a separation which was due to the misconduct of or procured by the [veteran] without the fault of the widow." In an opinion dated September 29, 1947 (No. 882-47), the Solicitor of the Veterans Administration held that "regardless of the reason for the initial separation, a claimant may not be considered as being without fault within the meaning of the statute as to any period during which she cohabited with a man other than the veteran." This statute, it should also be noted, specifically refers to absence of "fault" on the part of the wife—unlike the Longshoremen's Act.

²¹ The law of divorce, assuming that its application in the administration of a workmen's compensation statute can be

C. Under the Act, the Legal Widow Is Not Entitled to Benefits Where, as Here, the Deputy Commissioner Properly Finds, From a Later Bigamous Marriage or Comparable Conduct, That She Has Terminated Her Status as the Wife of the Longshoreman Living Apart for Justifiable Cause or by Reason of His Desertion.

As we have already noted, the court below, in holding that petitioner's status as the wife of the deceased longshoreman living apart "by reason of his desertion" terminated prior to his death, expressly rejected the theory that it was passing judgment on the morality of petitioner's actions, *supra*, p. 26, fn. 19. In the view of that court, the undertaking by the wife of a bigamous or common law marital relationship requires the withholding of death benefits simply because it amounts to a

justified from any standpoint, presents equal if not greater difficulties. Because many courts regard a divorce action to be an equitable proceeding, the "clean hands" maxim is frequently employed to deny a divorce where there has been marital misconduct on the part of the complainant. And closely related to this maxim, indeed often confused with it, is the doctrine of recrimination, which permits the respondent to interpose, as an absolute defense to the divorce action, adultery or other misconduct by the claimant which in itself is a ground for divorce. Virtually every jurisdiction recognizes at least one of these concepts; consequently, few persons in the position of either petitioner or the longshoreman could obtain a divorce. It is not significant that the adultery set up by way of recrimination occurred long after the beginning of the desertion period. And, conversely, in such circumstances the desertion may be interposed as a recriminatory defense to an action based upon the adultery. Nelson, *Divorce and Annulment*, §§ 10.01, 10.02, 10.05, 10.06.

While the Bureau of Employees' Compensation in the Department of Labor has not taken a formal position on the

renunciation of her status as the wife of the employee. Once such a renunciation has taken place, the causal connection between the living apart and the initial misconduct of the husband is deemed to be broken.

It can hardly be disputed that the interpretation placed by the court upon petitioner's bigamous marriage is patently correct. There may be doubt as to petitioner's attitude toward her marriage with the longshoreman during the first fifteen years following the desertion, even though, as the Deputy Commissioner found (R. 8), she made no effort to compel support from him by court decree or otherwise. But by thereafter going through a marriage ceremony with another man, and holding herself out to be his wife (including the adoption of his name), petitioner must be assumed to have made a determination to sever any remaining ties with the longshoreman.

proper interpretation of Section 2(16), the Federal Employees' Compensation Appeals Board, in the administration of the similar provision in Section 10(H) of the Federal Employees Compensation Act (see fn. 6, *supra*, p. 12), has expressed the view that [*In the Matter of Rose Munoz*, (Docket No. 48-114, August 8, 1949) p. 4]:

[T]he status of parties under workmen's compensation law, does not rest solely upon law applicable to divorce, as such law takes largely into account equities *inter se* and moral judgments. Principles applied under the compensation law are not designed to implement moral judgments, but to accomplish social and economic ends,—security for the employee and his family.

In the final analysis, therefore, the force of the petitioner's attack on the judgment below turns not upon whether the Deputy Commissioner was empowered to deny her claim a punishment for the commission of an immoral act, but instead upon the issue whether her freely exercised choice to disavow the marital relationship, as evidenced by the bigamous marriage, deprives her of benefits under the Longshoremen's Act. From the standpoint of the Act's compensatory purpose, the answer seems to us to be in the affirmative. Although indemnification for demonstrable economic loss may not be the sole end that Congress had in mind, the Longshoremen's Act, and the workmen's compensation system in general, are meaningful only if the benefits can be related to a loss of some kind. Cf. *Weeks v. Behrend*, *supra*, 135 F. 2d at 259; see *supra*, pp. 17, 18. Petitioner does not, and quite clearly cannot, point to a way in which she has been adversely affected by the death of the longshoreman here. Neither economic nor emotional loss has been shown, and neither can be presumed in these circumstances. Moreover, even if the compensatory objective of the Longshoremen's Act be disregarded, petitioner's repudiation of her status as the longshoreman's wife gives a hollow ring to her claim that she should be awarded benefits because of such status.

Section 2(16) is entirely consistent with the rejection of petitioner's claim on this basis. By its terms, the living apart *at the time of death*

must be for "justifiable cause" or by reason of the longshoreman's desertion; in other words, the "living apart" *at the time of death* must be proximately connected to some misconduct of the longshoreman or to some reason for leaving him. Such is not the case in situations of this kind. It is true that the employee's desertion may have influenced petitioner's decision to embark upon a new life with another man. Nevertheless, once petitioner had made that decision, and had carried it out, the causal relation between the original desertion and the living apart disappeared. Realistically viewed, she lived apart thereafter because she had affirmatively disclaimed her marriage to the longshoreman and had become the "wife" of another.

The short of the matter is, we think, that the court below has applied Section 2(16) in this case in a manner which accords with both the ~~Statutory~~ language and the over-all purposes of the Act. And there is no reason why its application should result in the imposition of an untoward or novel administrative burden upon the Deputy Commissioners. Admittedly, the determination whether the claimant affirmatively disavowed the marital relationship after separating from her husband for justifiable cause, or by reason of his desertion, will not always be easily made. For, while the undertaking of a bigamous or common law marriage may, in and of itself, warrant a conclusive presumption of disavowal, the same can-

not be said of other acts less decisive in character, *e.g.*, the rejection of an offer to return to the husband or a gratuitous statement by the wife to the effect that she never again intends to resume marital living. In drawing an inference from such conduct, the Deputy Commissioner necessarily must give careful consideration to the setting.²² On occasion, the record taken as a whole

²² This is amply demonstrated by petitioner's rejection of the offer to return to her husband *supra* p. 5. Insofar as the Deputy Commissioner's findings show, the offer was not coupled with any assurance by the longshoreman that he would in future fulfill his marital obligations to petitioner. Leaving aside the question whether under Florida law petitioner was under a duty to accept such a belated offer (see Pet. pp. 6; 7)—a consideration that we believe to be far from decisive for the purposes of the Longshoremen's Act—it is doubtful whether in these circumstances the rejection can be taken as an election on petitioner's part to treat the marital relationship as terminated. After a twenty-five year separation, a wife is justified in taking a casual offer of reconciliation as affording insufficient basis for returning to the husband.

It is far from clear that the Deputy Commissioner's determination that petitioner was not living apart from the longshoreman at the time of his death "for justifiable cause or by reason of his desertion" was grounded to any extent upon the refusal of the wife to accept the belated offer to resume marital relations. The Deputy Commissioner was undoubtedly aware that, under the prior holdings of the Fifth Circuit (See *supra* p. 14), petitioner's bigamous marriage in itself required the rejection of her claim. Accordingly, there was no necessity for him to consider the effect of this refusal. And had the Deputy Commissioner deemed petitioner to have been under some form of obligation to accept the longshoreman's offer to return, it is reasonable to suppose that he would have so stated in clearer terms.

may justify more than one inference as to the purpose and conduct of the claimant. But this is equally a problem in the resolution of many of the other questions upon which an award of compensation may hinge and as to which the Deputy Commissioner's finding is conclusive, if it has a reasonable foundation in fact and in law. Cf. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 505; *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469; *Del Vecchio v. Bowers*, 296 U.S. 280; *South Chicago Co. v. Bassett*, 309 U.S. 251; *L'Hote v. Crowell*, 286 U.S. 528, explained in *The Admiral Peoples*, 295 U.S. 649, 653-654.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

✓ ✓ ROBERT L. STERN,
Acting Solicitor General.

✓ WARREN E. BURGER,
Assistant Attorney General.

✓ SAMUEL D. SLADE,

✓ LESTER S. JAYSON,

no ALAN S. ROSENTHAL,
Attorneys.

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